American Ambulette Corp. ***and*** **David Nameny.**
Case 2–CA–23108

November 17, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On August 18, 1993, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel filed an exception, a supporting brief, and a brief in support of the administrative law judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exception and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, American Ambulette Corp., Yonkers, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Offer David Nameny immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.''

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly.

''(c) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.''

3. Substitute the attached notice for that of the administrative law judge.

[1] We find merit in the General Counsel's exception and shall modify the judge's recommended Order to add a requirement that the Respondent expunge from its records any reference to the unlawful discharge of David Nameny. We shall also modify the judge's recommended Order to conform his reinstatement language to that traditionally used by the Board.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT assign our employees onerous working conditions because of their or their relatives' participation in NLRB proceedings.

WE WILL NOT discharge our employees because of their or their relatives' participation in NLRB proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer David Nameny full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make him whole for any loss of earnings and other benefits he may have suffered by reason of the discrimination against him.

WE WILL notify David Nameny that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

AMERICAN AMBULETTE CORP.

Margit Reiner, Esq., for the General Counsel.
Daniel J. Roberts, Esq. (Roberts & Roberts), for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on April 20 and 21, 1993, in New York, New York.

On October 14, 1988, David Nameny, an individual, filed a charge against American Ambulette Corp. (Respondent), alleging that Respondent discharged him in violation of Section 8(a)(1) and (4) of the Act. On October 5, 1992, a complaint issued alleging that Respondent had discriminatorily assigned David Nameny onerous working conditions and thereafter discharged him because his wife, Patricia Nameny, had testified in a prior Board proceeding.[1]

[1] This case was being processed by the New York State Department of Labor at the time the charge was filed in this proceeding. Since the remedy in the State of New York proceeding was the same as the Board's remedy should the charging party be successful, issuance of the instant complaint was suspended, pending determination by the state proceeding. Ultimately, the state department in-

Briefs were filed by counsel for the General Counsel and by counsel for Respondent. Upon a consideration of the entire record, the briefs and the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent is a New York corporation with an office and place of business in Yonkers, New York, where it is engaged in the business of providing ambulette services to individuals. Respondent annually, in the course of its business derives gross revenues in excess of $500,000 and purchases and receives at its Yonkers facility goods and products valued in excess of $5000 from points directly outside the State of New York. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

David Nameny became employed by Respondent as a driver sometime in 1985. A year and a half or so later he was transferred to the title of paratransit supervisor. This transfer did not result in any pay raise. In view of David Nameny's title at the time of his discharge it was alleged in the complaint that he was a supervisor as defined in Section 2(11) of the Act, and that he was discharged in violation of Section 8(a)(1) of the Act. Respondent by its answer denied David Nameny's supervisory status, and General Counsel's complaint was amended at the trial to allege that his assignment of onerous duties and subsequent were in violation of Section 8(a)(1) and (3) in the event that the record establishes that he was not a supervisor within the meaning of the Act. The evidence establishes that his duties during the period of time he was classified as a supervisor consisted essentially of driving Respondent's vehicles and picking up handicapped people at their home and driving them to where they were going and dropping them off, and training new drivers. There is no evidence that he exercised any of the supervisory functions set forth in Section 2(11) of the Act. Accordingly, I conclude that David Nameny was an employee as defined in Section 2(3) of the Act at the time of his discharge.

Patricia Nameny was employed by Respondent in 1986 and worked in the dispatchers office performing various clerical functions. She had constant contact with the Minerva's, Dan and Lenore Minerva and their son Michael, who owned Respondent corporation. Sometime during the fall of 1987, Local 531 International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America (the Union) began an organizing campaign among Respondents drivers. On October 21, the Union called a strike and many of the drivers went out on strike. The strike ended on or about October 27, 1987. Thereafter Respondent discharged several strikers and on November 25, the Union filed unfair labor practices. Subsequently the Union filed additional charges. A complaint issued alleging various 8(a)(1) violations and the discriminatory discharges of three employees in violation of Section 8(a)(3). On May 12, 1988, David Nameny injured his back in a job-related injury and went out on workmen's compensation. On June 1, 1988, Patricia was terminated. Her termination was not alleged as a discriminatory discharge. On September 26, 1988, the above-stated complaint (Cases 2–CA–22505 and 2–CA–22746) was tried. Patricia Nameny testified as a witness for the General Counsel. Her testimony against Respondent was devastating. Patricia Nameny testified that the Minerva's stated among other things that they would close their shop before they would recognize the Union and that they would wait until their employees goofed up on the job and would fire those employees who supported the Union and went out on strike. Respondent entered into a settlement agreement on September 27, 1988. On October 26, the same day Patricia Nameny testified, David Nameny notified Respondent that he was ready to return to work. On September 27, David Nameny reported for work. He handed General Manager Raymond Sassano a doctor's note which stated that he was able to return to his job and resume his normal duties.[2]

Respondent employs drivers who are classified as paratransit and ambulette drivers. The essential difference between the two classifications is that a paratransit driver picks up the individual using the service at the curbside, while an ambulette driver goes into the individual's home or apartment and takes the individual using Respondent's service from their home or apartment to the curb. In performing this operation, the Ambulette driver is often required, where there is no elevator to wheel the passenger down one or more flights of stairs. This aspect of the job requires considerable physical effort by the driver. From the curb, individuals using both types of service are then transported into the the respective vehicles by means of a ramp. Although the ramps of paratransit vans are mechanically different from those of the ambulettes, the effort in setting up the ramps and in moving the passenger into the vehicle is essentially the same.[3] Moreover, while some drivers may usually operate one type of vehicle or another the drivers are interchangeable and are assigned to drive one vehicle or another as required by the needs of Respondent on a particular day.[4] Although there is no difference in skills required to perform one job over the other, it is clear, and I conclude that the work performed by an ambulette driver is generally much more physically demanding.

On September 27, the morning after Patricia Nameny had testified in the NLRB trial, described above, David Nameny reported for work. He had a doctor's note which indicated that he could resume his usual duties. The note contained no

formed Region 2 that they were dropping the case because of their huge backlog. No decision had been made on the merits. In view of the State Department of Labor's action, the instant complaint issued on October 5, 1992.

[2] The complaint alleges that Sassano and Thomas Nasce, director of safety and personnel, are supervisors within the meaning of the Act. Respondent denies this allegation. The supervisory status of Sassano and Nasce is discussed below.

[3] These findings of fact are based upon the credible testimony of Respondent driver Ernest Gonzalez. I was impressed with Gonzalez' demeanor. He spoke very knowledgeably, and in detail about both vehicles' operation. Further, although employed by Respondent, he impressed me as an essentially neutral witness who testified with an air of detachment as to the details of Respondent's operation.

[4] This is established by the credible testimony of Gonzalez. Although Gonzalez was hired after David Nameny was discharged, I find that Respondent's operation was essentially the same both at the time David Nameny was fired and thereafter. Such interchange of drivers would appear to be necessary for Respondent's efficient operation. Thus I find Gonzalez' testimony to be logical. Moreover, such testimony was corroborated by the testimony of Michael Minerva.

restrictions or limitations as to his ability to perform any job functions. He presented this note to Ray Sassano, a supervisor within the meaning of Section 2(11) of the Act.[5] A doctor's note was a precondition for David Nameny's return to work. After presenting Sassano with the doctor's note Sassano told him he could return to work and promptly assigned him to take out the school bus and pick up and transport a list of patients requiring Respondent's service. The school bus was used for ambulette service, rather then paratransit service. David Nameny told Sassano that he would try to handle the route, but that he was concerned about any excessive bending or lifting that might be required because of his back. Sassano told him to take out the bus and David Nameny did so. While Nameny was performing his third pickup, he testified that as he was pulling a patient up the bus ramp he pulled out his back and felt pain. There was no evidence submitted, and no reason to believe that Nameny did not reinjure his back as he testified. Nameny immediately called Sassano and informed him that he had reinjured his back, and Sassano told him to take an early lunchbreak and call him after lunch and he would give him further assignments.

Following his lunchbreak Nameny called Sassano and told him his back was no better. Sassano then assigned him to a six-flight walkup job. This assignment required Nameny to pick up a patient in a wheel chair, walk him down the bus ramp to the curb and then walk him in the wheel chair up six flights of stairs. I conclude this was an exceptionally strenuous job and that Sassano was aware of it. Sassano told Nameny that since the doctor's note permitted him to return without restrictions, he had to perform the job as ordered. Nameny told Sassano that in view of his reinjured back he was unable to perform the job. Sassano told Nameny that he should do as ordered or bring in the bus and go home. Rather then risking any further serious reinjury, Nameny returned the bus to Respondent's facility without making the assigned pickup.[6] He was then told by Sassano to go home and not to return until he called Nasce.

On September 28, David Nameny visited his doctor to have his back examined. He asked his wife, Patricia, to call Respondent and tell them that he would be unable to work that day and that he was seeing his doctor. Patricia Nameny called Respondent and spoke to Supervisor Nasce and told him that David had reinjured his back on September 27 and was being examined by his doctor and would not be in to work this day. Nasce told Patricia that he would get back to David.[7]

On September 29, without attempting to contact David Nameny, Respondent sent him a letter which states:

> On September 27, 1988 you were told by Ray Sassano to come into work and see me on September 28, 1988. You never showed up for work, and therefore because of your actions on September 27, 1988, you are no longer entitled to anything from American Ambulette.

This letter was signed by Nasce with his title set forth below his signature as ''Safety & Personnel Manager.''

Counsel for Respondent admits that as of September 20, 1988, both Sassano and Nasce were supervisors within the meaning of the Act. Sassano was employed as Respondent' general manager, and Nasce employed as safety and personnel manager. In this connection Michael Minerva, Respondent's vice president testified that as of September 27, 1988, Sassano had the authority to issue warnings, authorize overtime, grant an employee time off, and make the daily assignments. Nasce, had even more authority since Sassano, when he told David Nameny to go home on September 27, told him not return to work until he first called Nasce to clear such return. Moreover, it was Nasce's letter dated September 28, that effectively discharged David Nameny.

Counsel for Respondent contends that by a letter to the Regional Director dated September 22, 1988, he informed the Regional Director that Nasce and Sassano were no longer supervisors within the meaning of the Act. In fact this letter utterly fails to support Respondent's contention. The letter was a request for postponement in Case 2–CA–22505. The case then scheduled for September 26 in which Patricia Nameny gave testimony. The letter does not describe any change in the supervisory capacity of either Nasce or Sassano, but merely points out as a reason for the postponement that in view of the recent death of Respondent's president, Daniel Minerva, there was a ''shake up'' among Respondent's personnel.

The evidence also establishes that subsequent to September 20 and at all times up to the discharge of David Nameny on September 28, 1988, Nasce and Sassano retained their supervisory duties. As set forth above it was Sassano who assigned Nameny his ambulette route on September 26, and ordered him to make the six-flight walkup job which Nameny was unable to perform. Sassano also ordered Nameny to return to Respondent's facility when Nameny informed him of his inability to do so and later ordered him not to report to work until he cleared it with Nasce. Thus Sassano had the authority as of September 26 to assign work, and effect discipline by ordering Nameny home. This evidence also establishes that Nasce had the authority to determine whether an employee could continue working, and the discharge letter signed by Nasce on September 28, over his supervisory title establishes that Nasce had the authority to discharge employees.

The evidence also established that both prior to and subsequent to September 20, both Sassano and Nasce were salaried employees and that their duties remained unchanged after September 20. In addition they were not required to punch a clock. Rank-and-file employees were hourly paid employees who were required to punch a clock. Additionally, Barry Dawkins, a driver employed by Respondent, credibly testified that following September 20, he observed no change in the duties of Sassano or Nasce. Moreover, simple logic strongly suggests that with the death of Daniel Minerva, the responsibilities of Respondent's supervisory staff would increase, rather then diminish.[8] The Board has held that the

[5] As set forth and described below, I conclude contrary to Respondent's contention that Ray Sassano and Thomas Nasce are supervisors within the meaning of Sec. 2(11) of the Act.

[6] Although Sassano was employed by Respondent at the time of this trial, he was not called as a witness by Respondent.

[7] Although Nasce was employed by Respondent at the time of this trial he was not called as a witness by Respondent.

[8] To the extent Vice President Michael Minerva's testimony suggests that Sassano and Nasce's supervisory authority was eliminated, I discredit such testimony. I found Minerva to be a generally evasive witness who gave contradictory evidence on the central issue to this

possession of any one of the powers enumerated in Section 2(11) of the Act is sufficient to establish supervisory authority within the meaning of the Act. *Cypress Lawn Cemetery Assn.*, 300 NLRB 609, 617 (1990); *Superior Bakery*, 294 NLRB 256, 262 (1989), enfd. 893 F.2d 493 (2d Cir. 1990).

Accordingly, I conclude that at all times material herein, including September 28, 1988, both Sassano and Nasce were supervisors within the meaning of the Act.

In determining whether an employer discriminates against an employee for his union activities, the General Counsel has the burden of proving that the employees' union activities were a motivating factor in the discrimination alleged. Once such factor is established, the burden shifts to Respondent to establish that such action would have taken place in the absence of such union activity. *NLRB v. Transportation Management Corp.*, 462 U.S 393 (1983); *Wright Line*, 251 NLRB 1080 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Discrimination by an employer against an employee for utilizing the Board's processes constitutes a violation of Section 8(a)(1) and (4) and the same legal principles necessary to establish discrimination for union activities apply. *Great Western Produce*, 293 NLRB 362 (1989); *Pepsi Cola Bottling Co.*, 301 NLRB 1008 (1991), enfd. 953 F.2d 638 (4th Cir. 1992).

In the instant case, the complaint alleges that Respondent discriminated against David Nameny because of his wife, Patricia's testimony against Respondent in Case 2–CA–22505. In enforcing *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986), enfd. 823 F.2d 1086 (7th Cir. 1987), the circuit court noted that retaliation against an individual by retaliating against a family member is an ancient method of revenge.

The evidence in the instant case establishes that Respondent was aware of Patricia Nameny's testimony in Case 2–CA–22505 since their corporate officers' the Minerva's were present during the trial when Patricia testified. That her testimony was devastating is undeniable. Patricia Nameny in substance testified as to Respondent's intense union animus, its animus against the alleged discriminatees, and its intention to retaliate against them for such union activity by waiting for an opportunity to discharge them. Further, and most significantly, Patricia Nameny credibly testified in the instant trial, without contradiction by Leonore Minerva, who was present throughout this entire trial, that during a strike in connection with the allegations of Case 2–CA–22505, Leonore Minerva, the present president of Respondent, stated to her that she couldn't believe that Patricia's son-in-law was supporting the union by striking with other employees, and then asked Patricia which side she was on. This testimony establishes an inclination by Respondent to discriminate against one family member for the protected activities of another family member.

The evidence that Respondent assigned David Nameny onerous work in retaliation for his wife's prior testimony described above, is overwhelming. Given my conclusion that the work of paratransit drivers and ambulette is essentially the same, and that David Nameny's doctor's note did not indicate any physical limitations, I do not conclude that Sassano's initial assignment of the school bus ambulette was discriminatorily motivated. However, once the assignment was made David Nameny put Sassano on notice that the job might prove to strenuous for his back. Without any doubt, when Respondent became aware that David Nameny had reinjured his back, the assignment of a six-floor walkup job was sadistic and retaliatory. Given Respondent's animus, its inclination to discriminate against one family member to retaliate for the protected activities of another family member, and the timing of the assignment, the day after Patricia Nameny's testimony, I conclude that the General Counsel established a discriminatory motivation for the assignment.

The evidence that Respondent discharged David Nameny in retaliation for Patricia Nameny's testimony during the September 26 trial is even more overwhelming. When David Nameny was physically unable to perform the six-floor walk up job assigned to him, Sassano told him to return to Respondent's facility, which he did, and not return to work until he cleared it with Nasce. The day following Nameny's reinjury, September 28, although Patricia Nameny had called Nasce to inform him that David would be unable to work that day, and was in fact visiting his doctor concerning his injured back, Nasce sent out the above-described discharge letter. To issue a discharge letter to David Nameny after receiving a telephone call from his wife that he was injured and visiting his doctor following the discriminatory assignment of the onerous work which caused his reinjury, given the animus, the inclination to retaliate, and the timing described above is simply overwhelming evidence of a discriminatory motivation as to both the assignment of the six-floor walk up job and the discharge.

In view of the above, I conclude that the General Counsel has met its *Wright Line* burden. Respondent must now establish that the same action would have been taken in the absence of protected activity. Respondent's counsel contends that the assignment of the six-flight walkup was not discriminatorily motivated because when David Nameny notified Sassano that he had reinjured his back, Sassano gave him a lunchbreak. I find such contention ludicrous and unworthy of further comment.

Respondent's contention as to the allegation of a discriminatory discharge is that David Nameny was not discharged, but rather quit. This contention is directly contradicted by the reluctant testimony of Michael Minerva, who when questioned by me as to what the portion of the above September 28, letter signed by Nasce at Minerva's direction which stated ''because of your actions on September 27, 1988 you are no longer entitled to anything from American Ambulette,'' meant, he evasively reiterated what the letter stated. Only when pressed did Minerva reluctantly admit that the letter was a termination letter. Such evasive testimony eliciting an admission contrary to Respondent's contention that Nameny quit, not only destroys Minerva's credibility, but establishes that Nameny was indeed fired and that Respondent has given totally inconsistent and shifting reasons for Nameny's termination. The Board has consistently held that shifting reasons or defenses for an employee's termination of an employee establish a pretextual reason and under such circumstances an employer fails to meet its *Wright Line* burden. *C.J.R. Transfer*, 300 NLRB 1095, 1098, 1099 (1990); *Jennie-O Foods*, 301 NLRB 305, 320, 321 (1991).

Thus, I conclude that not only has Respondent failed to establish its *Wright Line* burden, but Respondent's shifting contentions concerning Nameny's discharge further establish

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case; whether David Nameny quit or was discharged as set forth and discussed below.

the true discriminatory motivation for Nameny's discharge. Accordingly, I conclude that David Nameny was discharged by Respondent in retaliation for Patricia Nameny's testimony before the Board, in violation of Section 8(a)(1) and (4) of the Act.

CONCLUSIONS OF LAW

1. Respondent is, and has been at all times relevant herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent imposed onerous working conditions upon David Nameny because his wife, Patricia Nameny, testified in a Board proceeding in Case 2–CA–22505, in violation of Section 8(a)(1) and (4) of the Act.

3. Respondent discharged David Nameny because his wife testified in the Board proceeding described above, in violation of Section 8(a)(1) and (4) of the Act.

THE REMEDY

Since I have found that Respondent discriminatorily discharged David Nameny, I shall recommend Respondent make him whole together with interest as set forth below, from the date of his termination until his reinstatement or valid offer of reinstatement.

Backpay for David Nameny shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950). Interest on and after January 9, 1990, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621 in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed as set forth in *Florida Steel Corp*., 231 NLRB 651 (1977).

I shall also recommend that Respondent expunge from its records any reference to the discharge of David Nameny and to provide written notice of such expunction to him, and inform him that Respondent's unlawful conduct will not be used as a basis for further personnel action concerning him. *Sterling Sugars, Inc*., 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, American Ambulette Corp., Yonkers, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Assigning onerous working conditions to its employees because of their or their relatives' participation in proceedings before the National Labor Relations Board.

(b) Discharging its employees because of their or their relatives' participation in proceedings before the National Labor Relations Board.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to David Nameny full and immediate reinstatement to his former or substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges previously enjoyed.

(b) Make David Nameny whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agent, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Staten Island, New York, copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''